

**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c.S.5, AS AMENDED**

- AND -

**IN THE MATTER OF
PETER SBARAGLIA**

**MEMORANDUM OF FACT AND LAW OF RESPONDENT,
PETER SBARAGLIA**
(Motion Heard February 8, 2013)

February 6, 2013

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PART I – OVERVIEW

1. Robert Mander (“Mander”) ran a Ponzi scheme. When his scheme was uncovered, he killed himself. Two investigations of Mander’s Ponzi scheme were commenced – one by the Ontario Securities Commission (the “OSC”) and the other by a Court-appointed receiver, RSM Richter Inc. (the “Receiver”). As a result of these investigations, Dr. Peter Sbaraglia (“Sbaraglia”) has been accused by the OSC of fraud and misleading it during the OSC investigation. In making these serious allegations, the OSC relied on reports prepared by the Receiver. These reports form part of the OSC *Stinchcombe* disclosure to Sbaraglia.
2. On January 24th, 2012, Sbaraglia brought a motion before the OSC seeking production of additional documents in the possession of the Receiver. His motion was dismissed on jurisdictional grounds. Sbaraglia then sought an Order from the Superior Court of Justice to compel the Receiver to provide him with the requested documents and information. His motion there was granted in part by the Honourable Justice Pattillo.
3. Sbaraglia appealed the decision of Justice Pattillo to the Court of Appeal requesting that his request for an Order be granted in full. The Receiver cross-appealed Justice Pattillo’s ruling. The Court of Appeal dismissed Sbaraglia’s appeal and granted the Receiver’s appeal in full. In its judgment, the Court of Appeal held that the proper forum for an order of this sort is the OSC.
4. Accordingly, Sbaraglia has now issued summonses to various individuals as well as the Receiver to obtain the information he originally attempted to obtain before both the OSC and the Superior Court. The Receiver now seeks to set aside the summons. The relief requested by the Receiver should not be granted because:

- (a) Sbaraglia is accused of fraud and dishonesty, and if such allegations are proven the potential sanctions include millions of dollars of fines and a ban on owning securities;
- (b) The issues on this motion are not *res judicata*;
- (c) The OSC has the power to issue a summons to compel a party such as the Receiver to provide documents under its *Rules of Procedure* and the *Statutory Powers Procedures Act* ("SPPA");
- (d) Sbaraglia has a right to make full answer and defence against these serious allegations and the documents in the Receiver's hands are relevant and central to that defence;
- (e) The summons is not abusive; and
- (f) The documents sought by Sbaraglia are relevant to the matters at issue before the OSC and will assist Sbaraglia in defending against the OSC's serious allegations.

PART II – STATEMENT OF THE FACTS

Background

5. Sbaraglia is a registered dentist with the Royal College of Dental Surgeons of Ontario. He met Mander in the Spring of 2005. Mander was an existing tenant in an office building that Sbaraglia and his wife purchased. Initially, Sbaraglia invested funds with Mander. After learning more about what Sbaraglia believed was a legitimate business model as well as interactions with some of Mander's investors (all of whom seemed content with Mander's handling of their funds), Sbaraglia subsequently incorporated an investment company, CO Capital Growth Inc. ("CO Capital"), in early 2006. The "C" and "O" stand for the names of Sbaraglia's children.

Affidavit of Peter Sbaraglia at paras. 2, 4.

6. The company borrowed funds (mainly from family members and close friends) to invest. CO Capital issued loan agreements and promissory notes. The company also researched value-

investment opportunities for Mander to trade. A significant portion of CO Capital's business consisted of investing with Mander and his various related companies, including E.M.B. Asset Group Inc. ("E.M.B.").

Affidavit of Peter Sbaraglia at paras. 5-6.

7. Sbaraglia was completely unaware that Mander was running a Ponzi scheme (for example, Sbaraglia's mother and daughter were CO Capital lenders). Sbaraglia's discovery of Mander's Ponzi scheme was made shortly after the application to put Mander into receivership was heard and Mander's death was discovered.

Affidavit of Peter Sbaraglia at para. 6.

Receiverships

8. On March 17, 2010, an Order was granted by Justice Morawetz appointing the Receiver over Mander and E.M.B. As a result of Mander's death, the Order was continued against Christine Brooks (the executor of Mander's estate).

**Affidavit of Peter Sbaraglia at para. 7.
Exhibit "A" to the Affidavit of Peter Sbaraglia.**

9. On July 2, 2010, the Receiver delivered its Fourth Report. In that report:

- (a) The Receiver concludes that Mander was operating a Ponzi scheme;
- (b) The Receiver lists six "primary investors" who invested directly with E.M.B. or Mander, including (i) Black Ink Capital Inc.; (ii) Trafalgar; (iii) Pero; and, (iv) J.S. Bradley;
- (c) The Receiver sought an Order authorizing it to investigate the business and affairs of CO Capital and Sbaraglia; and
- (d) The Receiver sought an Order compelling the production of all records in the possession and control of the accountant for CO Capital, Mander, and the other primary investors: Peter Tonin ("Tonin") of Tonin & Co. LLP.

Affidavit of Peter Sbaraglia at para. 9.

Exhibit “C” to the Affidavit of Peter Sbaraglia.

10. On July 9, 2010, the Receiver delivered a supplement to the Fourth Report seeking a similar production Order against Peter Welsh, former counsel to CO Capital and others referred to herein (“Welsh”).

**Affidavit of Peter Sbaraglia at para. 7.
Exhibit “D” to the Affidavit of Peter Sbaraglia.**

11. On July 14, 2010, Justice Morawetz granted an Order authorizing the Receiver to investigate the affairs of CO Capital and Sbaraglia, as well as the production orders concerning Tonin and Welsh.

**Affidavit of Peter Sbaraglia at para. 11.
Exhibit “E” to the Affidavit of Peter Sbaraglia.**

12. On September 8, 2010, Mehran Shahviri (“Shahviri”), the investigator at the OSC that investigated Sbaraglia and his company’s affairs, swore an Affidavit in support of the OSC’s motion seeking the appointment of a receiver over Sbaraglia, his wife Mandy, CO Capital and a related company.

**Affidavit of Peter Sbaraglia at para. 12.
Exhibit “F” to the Affidavit of Peter Sbaraglia.**

13. On September 9, 2010, the Receiver delivered its Seventh Report to court. In that report, the Receiver stated that “[t]he OSC was misled during its investigation” and that “[t]he Receiver believes that a receiver should be appointed over the business and assets of the CO Group.”

**Affidavit of Peter Sbaraglia at para. 13.
Exhibit “G” to the Affidavit of Peter Sbaraglia.**

14. On October 27 and 28, 2010, Shahviri was cross-examined by Sbaraglia’s then-counsel. In his cross-examination, Shahviri made multiple references to the reports of the Receiver, the role that those reports played in supporting the allegations against Sbaraglia, and his reliance on those reports. For example:

- (a) while the investigation was not complete at that point in terms of ultimate and final determinations, he had reviewed the Receiver's reports to inform his understanding of how monies flowed from CO Capital to Mander and back to CO Capital;
- (b) his Affidavit was "based on information that I've seen in the Receiver's report";
- (c) when asked whether he had the "slightest bit of evidence that the Sbaraglias knew that a Ponzi scheme [was] ongoing at the relevant time", Shahviri asserted that he did not; and
- (d) when pressed further as to any monies that Sbaraglia or CO Capital allegedly received from the Ponzi scheme or from which investors the money came from that went to CO Capital or Mander, Shahviri explained that he had "relied on the Receiver's reports in that regard."

**Affidavit of Peter Sbaraglia at para. 14.
Exhibits "F" and "H" to the Affidavit of Peter Sbaraglia.**

15. On November 12, 2010, the Receiver delivered its Ninth Report to the Court. In that report, the Receiver made various findings, including:

- (a) that CO Capital used investor funds raised from one investor to pay amounts owed to another investor;
- (b) that Mander's investment company repaid to CO Capital more monies than were advanced by CO Capital to Mander's company;
- (c) that CO Capital retained funds of its investors and ultimately lost those monies by investing in their own accounts or by using them for personal and business purposes.

**Affidavit of Peter Sbaraglia at para. 15.
Exhibit "I" to the Affidavit of Peter Sbaraglia.**

16. On December 23, 2010, Justice Morawetz granted the OSC's motion for the appointment of a receiver of Sbaraglia, his wife Mandy, CO Capital and another related company. In so doing, His Honour stated in part:

Counsel for Dr. Sbaraglia and Ms. Sbaraglia and the CO Group paints a very different picture of events. Counsel suggests that the proper narrative should be that a well-intentioned family was caught in the middle of a Ponzi scheme, that they were led into error by a career fraudster and ill-advising lawyers. Counsel

portrays his clients as victims of Mr. Mander, a predator fraudster. Counsel puts forth that his clients are guilty of no wrong-doing and that no investor had sued or made any claims against them. In fact, all investors, without exception, support them. ...

Counsel for the Sbaraglias takes the position that his clients are not to blame, but rather, others were involved. These include the lawyers who acted for both the Sbaraglias and also for Mr. Mander. Mr. Davis also contends that these lawyers breached their fiduciary duty, hid information from the Sbaraglias in their representation before the OSC and despite a grave conflict of interest, counsel advised the Sbaraglias and misinformed the OSC. ...

In making this determination, I cannot overlook that CO, Dr. Sbaraglia and Ms. Sbaraglia retained and had access to funds in excess of \$6 million. I also cannot overlook that they improperly used some of these funds for personal use or for related corporate use. I also cannot overlook that some of the new money was used to pay interest payments to old investors. To use the words of counsel of the receiver, "This is the hallmark of a Ponzi scheme where you keep the dollars rolling."

I have no doubt that Mr. Mander contributed significantly to the problems that the Sbaraglias currently face. I also have to take into account that there may be issues with respect to deficiencies in the legal advice that can be pursued in due course.

...

The Sbaraglias also take the position that breaches of securities legislation have not been clearly proven. I do note that under s. 129 there is a broad discretion that the courts can make such an order which does not require evidence of a breach. Having said that, there are certain very serious concerns that have been raised by the OSC with respect to possible breaches of the statute. ...

The factors that have led to my decision to appoint a receiver as being in the best interests of the company's creditors and the potential Sbaraglia creditors is also applicable for the appointment under the second part of the test. This was a Ponzi scheme. Although Mr. Mander may have been the head of the Ponzi scheme, it is clearly apparent that by using investors' money to repay other investors, steps were taken by the Sbaraglias that were improper. The use of investors' money to pay personal and related company expenses is also improper. It also cannot be overlooked that the Sbaraglias misled the OSC in the course of its investigation. This type of activity cannot and should not be overlooked and I am satisfied that the appointment of the receiver is also justified under the second part of the test.

**Affidavit of Peter Sbaraglia at para. 16.
Exhibit "J" to the Affidavit of Peter Sbaraglia.**

Proceedings before the Ontario Securities Commission

17. On February 24, 2011, the OSC filed a Statement of Allegations against Sbaraglia. OSC Staff (“Staff”) allege that Sbaraglia violated two provisions of the *Securities Act* (“Act”). First, that he engaged in securities fraud contrary to Section 126.1 of the Act. Second, that he misled Staff contrary to Section 122 of the Act. Specifically, the OSC has alleged that:

[5] As further described below, Sbaraglia, through his role in CO and his close involvement with Mander, participated in the Ponzi scheme in a manner which he knew or ought reasonably to have known perpetrated a fraud on investors contrary to s. 126(1)(b) of the Act.

[6] In addition to the fraudulent conduct described herein, Sbaraglia materially misled Staff of the Commission in its investigation into Sbaraglia, Mander and CO about the business of CO and others. Throughout the investigation, a number of statements were made to Staff by Sbaraglia and by his counsel that Sbaraglia knew were false and that Sbaraglia knew would mislead Staff in determining whether investors’ funds were at risk. At no point in the investigation did Sbaraglia take any steps to correct his false statements or those of his counsel.

**Affidavit of Peter Sbaraglia at para. 18.
Exhibit “L” to the Affidavit of Peter Sbaraglia.**

18. The OSC also seeks to rely on the decision of Justice Morawetz to appoint a receiver over Sbaraglia and CO Capital in support of the allegations made against Sbaraglia.

Exhibit “L” to the Affidavit of Peter Sbaraglia.

19. The most recent witness list provided to Sbaraglia by the OSC consists of two named OSC investigators (Shahviri and Stephanie Collins), and 5 unnamed investors.

Affidavit of Peter Sbaraglia at para. 83.

20. The disclosure provided by the OSC contains:

- (a) Transcripts of cross-examinations conducted in connection with the OSC’s motion to appoint a receiver;
- (b) The Application Record to appoint the Receiver in this proceeding;
- (c) Numerous motion records filed by the Receiver in this proceeding; and

(d) Several reports filed by the Receiver in this proceeding.

Exhibit “N” to the Affidavit of Peter Sbaraglia.

21. On January 24, 2012, Sbaraglia brought a motion before the OSC seeking the records of interviews conducted by the Receiver of certain individuals, as well as some related documents.

Commissioner Portner held in relevant part:

[3] With respect to the second item, the Respondent has deep concerns about information that may be available in the Receiver’s files or possession that could be relevant to his ability to respond to the allegations made against him by the Commission. It also appears that the Respondent has been led to believe by third parties that they may have provided exculpatory information to the Receiver which, for one reason or another, has not yet surfaced. I can understand how deeply this would concern the Respondent if he feels that there is information that would assist him in addressing the allegations against him.

[4] Regrettably, however, I agree with Staff’s position that the Commission does not have the authority to order productions from the Receiver, who is an independent officer of the Court, as Staff has submitted (see Staff’s disclosure obligations pursuant to rule 4.3(2) of the Rules). I do this recognizing the Commission’s limitations of authority, which is not open-ended authority as an adjudicative tribunal. The Commission is not a court, but as counsel for Staff has submitted, the Respondent is not without remedies. The Respondent is not left devoid of any ability to address the very things that concern him the most on this motion.

Affidavit of Peter Sbaraglia at para. 23.

Exhibit “O” to the Affidavit of Peter Sbaraglia.

22. Sbaraglia then brought a motion on May 9, 2012 before Justice Pattillo on the Commercial List to compel the Receiver to produce certain documents in the Receiver’s possession. In support of his request for relief, Sbaraglia raised two related but independent principles:

(a) Sbaraglia has a right to make full answer and defence before the OSC and his motion was analogous to an *O’Connor* application; and

- (b) Sbaraglia is an “interested person” to whom the Receiver owes an obligation to make full disclosure of relevant information.

23. Justice Pattillo found that Sbaraglia was an “interested party” but was not prepared to compel the Receiver to produce the requested documents on that basis. Instead, His Honour:

- (a) Held the Receiver was subject to the principles set forth in *O’Connor* and *McNeil*;
- (b) Found that some of the requested documents were “likely relevant”; and
- (c) Ordered the Receiver to produce the “likely relevant” documents for His Honour’s review pursuant to the principles set forth in *O’Connor* and *McNeil*.

***SA Capital Corp. v. Mander Estate*, 2012 ONSC 2800.**

24. Sbaraglia appealed the Order of Justice Pattillo to the Court of Appeal, and the Receiver commenced a cross-appeal. The Court of Appeal granted the Receiver’s cross-appeal and dismissed Sbaraglia’s appeal. In its judgment, the Court of Appeal made two central holdings: first, that Sbaraglia was not an “interested person” in the context of the receivership, as the context in which he intended to use the information he was seeking was for a purpose collateral to the receivership; and second, that it was inappropriate for Justice Pattillo to make an interlocutory procedural order in relation to a proceeding before the OSC, as such orders are only to be made by the presiding tribunal in any given case.

Pending Proceedings Before the OSC

25. On April 30, 2012, Sbaraglia’s motion seeking to adjourn the upcoming hearing was granted. The hearing was scheduled to commence on October 22, 2012. However, given Sbaraglia’s appeal and the Receiver’s cross-appeal to the Court of Appeal, a second motion

seeking an adjournment was brought by Sbaraglia on July 19, 2012 and was granted by Commissioner Portner. The hearing is now set to commence on March 18, 2013.

Order of OSC Commissioner Portner, dated April 30, 2012.
Order of OSC Commissioner Portner, dated July 19, 2012.

Documents Being Sought by Sbaraglia

26. Sbaraglia seeks the following documents from the Receiver pursuant to Appendix "A" to the summons:

- (a) Copies of all documents relevant to the Statement of Allegations;
- (b) Copies of all documents provided to the Receiver by the 15 named individuals;
- (c) Copies of all notes taken by the Receiver and/or the Receiver's lawyer during the interviews conducted by the Receiver and/or the Receiver's lawyer or the 15 individuals named above;
- (d) Copies of all recordings of any interviews, including the recording of the interview of Julia Dublin; and
- (e) Copies of all documents provided by the Receiver and/or the Receiver's lawyer to the OSC.

27. In general terms, Sbaraglia seeks information collected by the Receiver from individuals which fall into at least one of three categories: first, their involvement with Mander pre-dated Sbaraglia's involvement; second, they had a professional relationship with Mander, Sbaraglia, and/or primary investors; third, they were closer to Mander than Sbaraglia. The table below lists the individuals that Sbaraglia knows or believes were interviewed by the Receiver:¹

¹ For further information regarding each individual's relevance to Sbaraglia's defence at the OSC, refer to the Affidavit of Peter Sbaraglia at paragraphs 36 through 85.

| Name | Relationship to Mander and/or to Sbaraglia & Key References in Record Before Court Below |
|-------------------------------|--|
| Maria Zurini | Zurini was Mander's girlfriend and office manager. Sbaraglia often interacted with Zurini (Sbaraglia Affidavit, paras. 36 – 38). |
| Grant Walton | Walton was Mander's landlord and eventual business partner at Mander Walton. Walton spoke with Sbaraglia about Mander Walton and their relationship. Mander Walton was listed as a "related entity" by the Receiver in its first report (Sbaraglia Affidavit, paras. 39 – 41; Receiver's First Report). |
| Tasha Fluke | Fluke was a partner at FM Market Capital ("FM") with Mander. FM was listed as a "related entity" by the Receiver in its first report. Fluke was one of the first individuals to invest with Mander (and pre-dated Sbaraglia's relationship with Mander). Never discussed any dissatisfaction with Sbaraglia about Mander. (Sbaraglia Affidavit, paras. 42 – 44; Receiver's First Report). |
| Colleen Auriemma | Auriemma was in business with Mander (Black Ink Capital Growth) at same time Sbaraglia incorporated CO Capital. Ran Mander's art gallery, Dunn Street Gallery, and was active liaison between Mander and Davide Amato (Sbaraglia Affidavit, paras. 45 – 47 and Exhibit "C"; OSC Disclosure Index Vol. 19, Tab 11; Receiver's First Report, pp. 5 – 6). |
| Deryl Ward | Ward was the IT consultant for most of Mander's companies. He was also a full-time employee of CO Capital during time that Mander was a partner at CO Capital. Ward assisted Mander in setting up his investment companies. He was the only creditor to not oppose the appointment of Receiver over Sbaraglia (Sbaraglia Affidavit, paras. 48 – 51 and Exhibits "T" and "U"; Receiver's Fourth Report, p. 27). |
| Julia Dublin & Michael Miller | Dublin was Sbaraglia's lawyer from approximately May 2009 to early 2010. Miller was co-counsel with Dublin and also acted as litigation counsel for Mander in defence of an action brought by Fluke. Sbaraglia retained Dublin and Miller on the advice of Mander. Dublin and Miller appeared at Sbaraglia's compelled interview at the OSC in 2009. Sbaraglia is presently suing Dublin and Miller for breach of their professional obligations (Sbaraglia Affidavit, paras. 52 – 54 and Exhibit "T"; OSC Disclosure Vol. 27; Receiver's Seventh and Ninth Reports). |
| Peter Welsh | Welsh was a lawyer who assisted with setting up many of Mander's companies. Sbaraglia relied on representations made by Welsh to Sbaraglia regarding Mander's integrity. Welsh is also currently being sued by Sbaraglia (Sbaraglia Affidavit, paras. 29 – 31, 55 – 57 and Exhibit "D"; Receiver's Seventh and Ninth Reports). |
| Peter Tonin | Tonin was the accountant for most – if not all – of Mander's companies as well as CO Capital (Sbaraglia Affidavit, paras. 29 – 31, 58 – 62 and Exhibit "V"; |

| | |
|-------------------|--|
| | Receiver's Seventh and Ninth Reports). |
| Terri Oldfield | Oldfield was Mander's account manager at HSBC and eventually his executive assistant. Sbaraglia also had an ongoing professional relationship with Oldfield in the context of his relationship with Mander. Sbaraglia witnessed first-hand the degree to which Oldfield was knowledgeable about Mander's business (Sbaraglia Affidavit, paras. 63 – 65). |
| Heather Shantora | Shantora was a 50/50 partner with Mander at Trafalgar Capital Growth Inc. Shantora was one of the first individuals who Sbaraglia knew or had been told invested with Mander. Shantora has been interviewed by the OSC (Sbaraglia Affidavit, paras. 66 – 68; OSC Disclosure Vols. 22 and 51). |
| Davide Amato | Amato was a former lender to CO Capital who ultimately ended up secretly starting a company with Mander. In his OSC interview, Amato indicates that he went into business with Mander without wanting Sbaraglia to know about it. Amato has been interviewed at least twice by the OSC (Sbaraglia Affidavit, paras. 69 – 72 and Exhibit "W"; OSC Disclosure Vols. 23 – 26). |
| Thomas Obradovich | Obradovich was a former lender to CO Capital who subsequently invested directly with Mander, shared a web-trader account with Mander, and had a land development deal at Horseshoe Valley with Mander. The OSC has alleged that Sbaraglia misled them regarding an allegation that he failed to disclose a liability owing to Obradovich. Obradovich has been interviewed by the OSC (Sbaraglia Affidavit, paras. 73 – 77 and Exhibit "K"; OSC Disclosure Vols. 32 (Tabs 1 – 2) and 52 (Tab F); Receiver's First Report, p. 8). |
| Bradley Ivanchuck | Ivanchuck incorporated J.S. Bradley, one of six primary investors with Mander as noted by the Receiver in its first and fourth reports (Sbaraglia Affidavit, paras. 78 – 80 and Exhibit "C"; OSC Disclosure Vol. 19 (Tab 23); Receiver's First and Fourth Reports). |
| Christine Brooks | Brooks is the executor of Mander's estate, and the mother of Mander's child (Sbaraglia Affidavit, paras. 81 – 82; Receiver's First and Fourth (p. 9) Reports). |
| Mehran Shahviri | Shahviri was the investigator at the OSC who investigated Sbaraglia and CO Capital's affairs. He also swore the OSC's Affidavit in support of the motion to appoint the second receiver (Sbaraglia Affidavit, paras. 83 – 85 and Exhibits "F" and "H"; OSC Disclosure Vol. 32 Tabs 8 – 9). |

28. In the Receiver's Thirteenth Report, the Receiver:

- (a) Confirms that all but two of the individuals in the above table were interviewed;

- (b) Confirms that it generated notes and internal memoranda regarding the interviews;
- (c) The interviews of Miller and Dublin were recorded;
- (d) Advises that neither Walton nor Fluke were interviewed; and
- (e) Advises that it did not keep track of the documents provided by those it interviewed.

Thirteenth report of the Receiver, dated April 30, 2012.

PART III – ISSUES AND THE LAW

29. The central issues in this motion are:

- (a) Whether the Court of Appeal fully and finally determined the issue in this motion rendering it *res judicata*;
- (b) The scope of the summons power granted to the OSC by Section 12 of the *SPPA* and section 4.7 of the *OSC Rules of Procedure*;
- (c) Sbaraglia's right to make full answer and defence against the allegations before the OSC;
- (d) The relevance of the requested documents; and
- (e) Whether the summons is abusive.

30. For the reasons set out herein, it is respectfully submitted that:

- (a) The doctrine of *res judicata* does not apply because the Court of Appeal did not determine whether or not OSC summonses are ineffective against receivers;
- (b) The OSC has the power to issue a summons to compel the Receiver to produce the documents requested by Sbaraglia pursuant to its powers under the *SPPA* and the *OSC Rules of Procedure*;
- (c) Sbaraglia is entitled to receive relevant documents from the Receiver as part of his right to make full answer and defence against the OSC's allegations, and this right trumps any privileges or protections afforded to the Receiver elsewhere;
- (d) The documents sought by Sbaraglia are relevant to matters at issue in the OSC proceeding and there is no basis upon which they should be withheld; and
- (e) The summons is not abusive.

(A) *Res Judicata* Does Not Apply

31. Contrary to the Receiver's submissions, the Court of Appeal did not determine whether or not OSC summonses are ineffective against court-appointed receivers. The Court of Appeal held that the Superior Court of Justice was not the correct venue to seek production of documents for use before the OSC. The Court of Appeal held:

[14] Matters such as disclosure, third-party production, and other pre-hearing orders required to ensure fair process are quintessentially matters to be dealt with by the Tribunal that will decide the case. Requests for third-party production give rise to issues of relevance, cost, delay and fairness, and it has long been recognized that the judge or tribunal charged with final decision-making authority is best placed to resolve such issues. In this case it is for the OSC to determine what procedural rights should be accorded to the appellant and it is for the OSC to ensure that the appellant is accorded a level of procedural fairness commensurate with the allegations he faces. If, at the end of the day, the appellant is not accorded appropriate fairness in the OSC proceeding, the law provides him with an appropriate remedy.

[16] In view of the conclusion we have reached, we make no comment on the merits of the appellant's assertion that he has a procedural right in the OSC proceeding to a third-party production order or on whether the documents he seeks are relevant.

SA Capital Growth Corp. v. Mander Estate, 2012 ONCA 681 at paras. 14 and 16.

32. It is respectfully submitted that the doctrine of *res judicata* is not engaged in circumstances where the Court has specifically and expressly refrained from deciding the issue in dispute.

(B) The OSC Has the Power to Compel Production pursuant to Summons Power

33. Section 12 of the *Statutory Powers Procedure Act* grants the OSC the power to order both the attendance of a witness and the production of admissible documents by that witness. In fact, the Divisional Court has noted that the summons power of the OSC is the final recourse in many situations where the Commission is seeking information for its proceedings. In *Deloitte &*

Touche LLP v. Ontario (Securities Commission), the Divisional Court discussed the Supreme Court of Canada's holding in *British Columbia Securities Commission v. Branch*, where the Divisional Court noted the significance of a commission's summons power:

The practical importance of securities commissions being able to obtain – and use in their proceedings – information which, given the nature of the securities industry, will generally be in the hands of private parties and must of necessity be gathered under summons.

When considering the term “public interest” in s. 17(1) of the [Securities] Act, the Commission must balance all relevant and competing interests. The Commission must evaluate the extent to which the policies of the Act are served by the purpose for which disclosure is being sought and the harm done by the disclosure to confidentiality interests.

Deloitte & Touche LLP v. Ontario (Securities Commission), 198 O.A.C. 333 (Div. Ct.) at paras. 56-57.

34. Respondents before the OSC are also entitled to seek the issuance and enforcement of summonses to witness. The broad investigatory powers of the OSC mean that those respondents must have the opportunity to seek and obtain relevant evidence from third parties to defend themselves before the OSC. The ability of respondents to defend themselves will be hampered if the OSC limits their ability to obtain evidence by way of summons or finds that OSC summonses are ineffective against certain classes of persons.

(C) Sbaraglia is Entitled to Make Full Answer and Defence

35. For the reasons set out below, Sbaraglia is entitled to receive relevant documents from the Receiver because:

- (a) Sbaraglia has the right to make full answer and defence before the OSC and the information requested by the summons is an essential component of Sbaraglia's ability to make full answer and defence;

- (b) An essential component of full answer and defence is the ability to obtain relevant documents not only in the hands of the prosecuting body but also in the hands of third parties.

36. In *R. v. Stinchcombe*, the Supreme Court held that the right to make full answer and defence is one of the pillars of the criminal justice system. This right depends on the disclosure of relevant information by the Crown prosecutor. In *Deloitte & Touche LLP v. Ontario (Securities Commission)*, the Supreme Court upheld a decision of the Court of Appeal confirming that the disclosure obligations imposed on Crowns by the *Stinchcombe* jurisprudence also apply to OSC prosecutors in s. 127 proceedings.

R. v. Stinchcombe, [1991] 3 S.C.R. 326 at para. 17.
Deloitte & Touche LLP v. Ontario (Securities Commission), [2003] 2 S.C.R. 713 at paras. 26-29.

37. In *R. v. McNeil*, Justice Charron explained the nature of the *Stinchcombe* obligation:

[17] The Crown's obligation to disclose all relevant information in its possession relating to the investigation against an accused is well established. The duty is triggered upon request and does not require an application to the court. *Stinchcombe* made clear that relevant information in the first party production context includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence (pp. 343-44). The Crown's obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.

[20] Implicit in the Crown's broad duty to disclose the contents of its file under *Stinchcombe* are not the absence of any residual expectation of privacy, but rather the following two assumptions. The first is that the material in possession of the prosecuting Crown is relevant to the accused's case. Otherwise, the Crown would not have obtained possession of it (*O'Connor*, at para. 12). The second assumption is that this material will likely comprise the case against the accused. As a result, the accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material. These two assumptions explain why the onus is on the Crown to justify the non-disclosure of any material in its possession.

***R. v. McNeil*, [2009] 1 S.C.R. 66 at paras. 17, 20.**

38. A defendant's right to make full answer and defence also encompasses the ability to seek documents in the possession of persons other than the prosecutor. In *R. v. O'Connor*, the Supreme Court approved a process now known as an '*O'Connor* application' to permit defendants to obtain the production of relevant documents from third parties. Defendants in criminal proceedings regularly bring *O'Connor* applications seeking all manner of documents to assist them in their defence.

***R. v. O'Connor*, [1995] 4 S.C.R. 411.**

39. As indicated above, Sbaraglia has a right to make full answer and defence before the OSC against the serious allegations (including fraud) made against him. This right encompasses both first party and third party disclosure. The mechanism to obtain third party disclosure available to respondents before the OSC is to seek the issuance of a summons.

40. The Receiver takes the position that he is effectively immune from summonses issued by the OSC. The cases relied upon by the Receiver do not support this claim of immunity, and protections and privileges afforded to a court-appointed receiver in a receivership proceeding are not transferrable to regulatory or criminal proceedings. Further, the Receiver's position in this matter is inconsistent with the conduct of a receiver in the Norshield matter. In that matter, the receiver testified for three days and gave evidence regarding his reports to the Court and the conclusions contained therein.

***Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685 (Div. Ct.).**

41. If the Receiver's motion is granted, respondents in OSC proceedings will be unable to obtain exculpatory information from receivers but those very same receivers can elect to assist

OSC prosecutors and provide incriminating information. None of the cases submitted by the Receiver endorse an approach that permits officers of the court to favour prosecutors over respondents, nor should the OSC endorse such an unfair outcome. The right to make full answer and defence should not be defeated by the whims and preferences of a court-appointed receiver.

(D) Documents Requested are Relevant and Should Be Produced

42. The investigations of the OSC and the Receiver overlapped and had the same focus – the affairs of Mander, Sbaraglia and others connected to Mander’s Ponzi scheme. The documents sought from the Receiver are relevant to the allegations made by the OSC and Sbaraglia believes that they contain information and admissions that will assist in his defence.

43. With respect to the allegation that Sbaraglia misled the OSC:

- (a) The OSC seeks to hold Sbaraglia responsible for statements made by Miller and Dublin, and the Receiver has recordings of interviews conducted with them;
- (b) In the Seventh Report, the Receiver concludes that Sbaraglia misled the OSC;
- (c) In the Ninth Report, the Receiver repeats the conclusion that Sbaraglia misled the OSC;
- (d) Part of this allegation concerns a transaction involving Obradovich and his company, Pero, and the Receiver has interviewed him; and
- (e) The OSC seeks to rely on Justice Morawetz’s reasons for appointing a Receiver over Sbaraglia, and that decision is based on the Receiver’s Seventh and Ninth reports.

44. With respect to the allegations of fraud:

- (a) The Receiver interviewed the individuals in the course of investigating the affairs of Mander and Sbaraglia;
- (b) In the Fourth Report, the Receiver insinuates that Sbaraglia may have deleted e-mails immediately prior to the CO Capital computers being imaged and that those emails are relevant;

- (c) In the Seventh Report, the Receiver concludes that:
 - i. Sbaraglia “had knowledge, or should have had knowledge” for certain losses, and the Receiver based that conclusion on a review of the documents provided by Tonin;
 - ii. Sbaraglia gave testimony “inconsistent” with his position that he was duped by Mander and that he had no knowledge of Mander’s activities;
- (d) In the Ninth Report, the Receiver concludes that it is “apparent” that Sbaraglia was involved in a Ponzi scheme;
- (e) As indicated above, the individuals interviewed by the Receiver have information relevant to Sbaraglia’s defence before the OSC; and
- (f) The OSC seeks to rely on Justice Morawetz’s reasons for appointing a Receiver over Sbaraglia, and that decision is based on the Receiver’s Seventh and Ninth reports.

45. As Justice Charron noted in *McNeil*, the governing rules of evidence and procedure inform the relevance analysis. In the case at bar, there are several aspects of the rules of evidence and procedure at the OSC that support a finding that the documents in the hands of the Receiver are relevant: first, the rule against the admission of hearsay is relaxed; and second, the OSC is not bound by the current position of the prosecution that the Receiver will not be called as a witness.

***R. v. McNeil*, [2009] 1 S.C.R. 66 at para. 44.**

46. Section 15 of the *Statutory Powers Procedure Act* permits the admission of hearsay and allows the OSC to act upon it. The key factor used to assess the weight of hearsay evidence before the OSC is the extent to which the hearsay evidence is corroborated by or consistent with other evidence. As the Commission held in *Re E.A. Manning Ltd.*:

... However, when such evidence was the only evidence on a particular issue, we have given it very little weight. To the extent that the evidence was corroborative of other evidence, on the other hand, we were prepared to give it greater weight.

Re E. A. Manning (1995), 18 O.S.C.B. 5317 at para. 28.

47. In the case at bar, the admissible hearsay evidence that should inform this panel's analysis comes from the Receiver and the Receiver's reports. Pursuant to Rule 4.5 of the OSC Rules of Procedure, the OSC prosecution is not required to advise Sbaraglia of the witnesses they intend to call until 10 days before the commencement of the hearing. This Rule also allows for witnesses not on the OSC witness list to be called so long as leave is secured from the hearing panel. While the OSC currently takes the position that it does not intend to call the Receiver, it can resile from this position immediately prior to – or even during – the hearing.

48. As a result, Sbaraglia will be faced with evidence from the Receiver – and from those that provided information to the Receiver – from the Receiver directly and/or through the admission of the Receiver's reports. Without access to the requested documents, Sbaraglia's ability to cross-examine the Receiver and/or rebut the information and conclusions contained in the Receiver's reports will be seriously compromised.

49. The Receiver's admission that much of the material contained in the interview records relates to what Mander told others means that the information – and whatever additional information can be obtained by Sbaraglia's defence counsel upon further review and investigation – can corroborate Sbaraglia's denial of any knowledge of the Ponzi scheme and to resist a finding that he ought to have known about the Ponzi scheme.

50. It is respectfully submitted that the materials requested by Sbaraglia are relevant and are essential to Sbaraglia's ability to make meaningful full answer and defence.

(E) The Summons is Not Abusive

51. The cases relied upon by the Receiver to support the claim that the summons is abusive overwhelmingly relate to summonses issued in the context of civil proceedings. With respect, those cases do not apply to summonses issued in the context of regulatory or criminal proceedings.

52. The only criminal case relied upon by the Receiver involved a Crown seeking documents from CBC reporters that had interviewed Robert Latimer. In that case, the subpoena demanded that they “bring all notes, books, records, reports, video tapes and documents related to this case with you”. In contrast to the subpoena at issue in *Ehman*, the summons in this proceeding contains very specific requests for documents. Unlike the reporters in *Ehman*, these requests are sufficiently precise that the Receiver has been able to take a position on their relevance.

53. There is also considerable evidence in the record to support the issuance of the summons. This record contains a 22 page detailed Affidavit attaching nearly 400 pages of Exhibits. Sbaraglia believes that the requested documents contain exculpatory evidence (such as admissions and other information that will assist his case) that, among other things, will assist in demonstrating the implausibility that he knew or ought to have known that Mander was perpetrating a fraud. With respect to each individual that Sbaraglia knew or believed was interviewed by the Receiver, the following information is contained in his Affidavit:

- (a) Who the person is;
- (b) The person’s relationship with Mander;
- (c) The person’s relationship with Sbaraglia;

- (d) The type of knowledge and/or information the person has;
- (e) In some instances, that OSC disclosure refers to the person or related entity; and
- (f) The allegations and/or issues in the OSC proceeding that the person's knowledge and/or information is relevant to.

54. With respect to the Receiver's claim that it is too costly for him to comply with the summons, there is no evidence regarding the specific cost to comply with the summons. Further, Sbaraglia has not "refused" to satisfy the costs award made by the Court Appeal – he is simply unable to do so. His impecuniosity is not a proper basis to prevent him from defending himself against the very serious allegations made against him.

PART V – RELIEF REQUESTED

55. For the aforesaid reasons, Sbaraglia respectfully requests that this panel deny the relief sought by the Receiver.

Dated: February 6, 2013

**ALL OF WHICH IS RESPECTFULLY
SUBMITTED**

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**IN THE MATTER OF THE SECURITIES ACT R.S.O.
1990, c.S.5, AS AMENDED**

and

IN THE MATTER OF PETER SBARAGLIA

**MEMORANDUM OF FACT AND LAW OF
THE RESPONDENT,
PETER SBARAGLIA**
(Motion to be heard February 8, 2013)

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